Nov 15 1877 5-204
submitted

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 93.

JOHN C. BATES AND J. A. YECKLEY, PLAINTIFFS IN ERROR,

vs.

W. N. BELMONT CLARK AND W. WARD BILL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

Abe

FILED AUGUST 6, 1875.

Nov 17 1877
Argued
Submitted

SUPREME COURT OF THE UNITED STATES.

No. 93.

JOHN C. BATES AND J. A. YECKLEY, PLAINTIFFS IN ERROR,

vs.

W. N. BELMONT CLARK AND W. WARD BILL.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

INDEX.

	Original.	Print.
Writ of error	1	1
Citation and service	3	1
Complaint	4	2
Answer	6	3
Amended answer	10	4
Verdict	14	6
Judgment	15	6
Appeal to supreme court of the Territory	16	7
Stipulation	18	7
Bill of exceptions	21	9
Judgment supreme court	27	11
Opinion	28	11
Clerk's certificate	38	14

1 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the judges of the supreme court of the Territory of Dakota, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said supreme court of the Territory of Dakota, before you, by appeal from the district court of Yankton County, in the second judicial district of said Territory, between W. N. Belmont Clark and W. Ward Bill, as respondents, and John C. Bates and J. A. Yeckley, as appellants, a manifest error hath happened, to the great damage of the said John C. Bates and J. A. Yeckley as by their complaint appears, we, being willing that the error, if any hath been, shall be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at Washington, on the second Monday of October next, in the Supreme Court of the United States to be then
2 and there held, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done to correct therein that error what of right and according to the laws and customs of the United States should be done.

Witness the honorable Morrison R. Waite, Chief-Justice of the said Supreme Court, the fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-five.

[SEAL.] B. S. WILLIAMS,
Clerk of the Supreme Court of the Territory of Dakota.

(Indorsed:) United States of America, Territory of Dakota. In the supreme court. John C. Bates and J. A. Yeckley, plaintiffs in error, vs. W. N. Belmont Clark & W. Ward Bill, defendants in error. Writ of error. Filed in my office this 15 day of July, A. D. 1875. B. S. Williams, clerk. W'm Pound, att'y for plaintiffs in error.

3 UNITED STATES OF AMERICA, *ss:*

To W. N. Belmont Clark and W. Ward Bill, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the supreme court of Dakota Territory, wherein John C. Bates and J. A. Yeckley are plaintiffs and you are defendants in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

Witness the honorable P. C. Shannon, chief-justice of the supreme court of Dakota Territory, this fifteenth day of July, in the year of our Lord one thousand eight hundred and seventy-five.

P. C. SHANNON,
Chief-Justice of Supreme Court of Dakota.

(Indorsed:) United States of America, Territory of Dakota. In the supreme court. John C. Bates et al. vs W. N. Belmont Clark et al. Citation. W'm Pound, att'y for plaintiffs in error.

Service of the within citation, by copy, admitted this 19th day of July, A. D. 1875.

JOHN B. SANBORN,
Att'y for Defendants in Error.

4 UNITED STATES OF AMERICA,
Territory of Dakota, ss:

In the Supreme Court, January term, A. D. 1874.

Be it remembered that on the second day of January, A. D. 1874, the following transcript was filed in this court:

Complaint.

Third judicial district, county of Pembina.

TERRITORY OF DAKOTA,
District Court, ss:

W. WARD BILL AND W. N. BELMONT CLARKE, copartners in business under the firm-name and style of Clarke & Bill, plaintiffs,
vs.
JOHN C. BATES, ALEXANDER WISHART, J. A. Yeckley, J. H. Burdick, and A. H. Moore, defendants.

The plaintiffs in the action above entitled, respectfully complaining, show to this court and state that they are and for one year last past have been copartners in business under the firm-name and style of Clark & Bill, and as such copartners they were, during the month
5 of February, A. D. 1873, engaged in the business of buying and selling goods, wares, and merchandise, and doing a general mercantile business on James River, in the said Territory of Dakota, near the point where the Northern Pacific Railroad crosses the said river, then in the county of Pembina, now in the county of Stutsman, in said Territory.

And that heretofore, on or about the twenty-first day of February, A. D. 1873, the said defendants unlawfully, maliciously, and with force and arms, did enter the store and premises of *of* the plaintiffs, near James River aforesaid; did then and there seize, take, and carry away goods, wares, and merchandise, and personal property, comprising, among other things, cloths of various kinds and description, shawls, blankets, gloves, mittens, mitts, threads, needles, combs, brushes, socks, stockings, powder, lead, envelopes, paper, cards, buttons, jewelry, beads, paints, ribbons, silks, flannels, shirts, pants, vests, coats, clothing, dishes, crockery-ware, stove-ware, scythes, snaths, coffee, tea, sugar, flour, pork, vinegar, canned fruits, pickles, tobacco, dried fruits, canned fish, meats, sardines, knives, forks, cutlery, candlesticks, spices, groceries of all kinds, lard-oil, stove-fixtures, and divers other articles of goods,
6 wares, and merchandise, making a full and complete stock for a frontier store, all of which was the property of the plaintiffs, and was of the value of six thousand dollars then and there; and that said defendants then and there converted to their own use said property and merchandise to the extent and value of six thousand dollars, to the damage of the plaintiffs, as they say, in the sum of six thousand dollars.

Wherefore the plaintiffs demands judgment against the defendants, and each of them, for the sum of six thousand dollars, besides the costs and disbursements of this action.

Saint Paul, July 11, A. D. 1873.

JOHN B. & W. H. SANBORN,
With S. G. COMSTOCK & S. G. ROBERTS,
FARGO, D. T.,
Plaintiffs' Attorney.

Answer.

Third judicial district, county of Pembina.

TERRITORY OF DAKOTA,
District Court, ss:

W. WARD BILL AND W. N. BELMONT CLARKE, copartners in business under the firm-name and style of Clarke & Bill, plaintiffs,
against
JOHN C. BATES, ALEXANDER WISHART, J. A. Yeckley, J. H. Burdick, and A. H. Moore, defendants.

7 1st. The above-named defendants, John C. Bates and J. A. Yeckley, for answer to the complaint of the plaintiffs herein, deny each and every allegation therein contained, and each and every part thereof, except such as are hereinafter admitted to be true.

2nd. The said defendants admit that the plaintiffs were partners and doing business as alleged in the complaint.

3rd. And the said defendants, further answering, show to the court and allege that all the country at and near the point where the Northern Pacific Railroad crosses the James River, in the said Territory of Dakota, was, on the 21st day of February last, and for a long time had been and still is, Indian country, within the true intent and meaning of the act of Congress entitled "An act to regulate trade and intercourse with the Indian tribes and to preserve peace on the frontier," approved June 30th, A. D. 1834.

4. That on the 21st day of February, A. D. 1873, and at divers times immediately prior thereto, the plaintiffs did introduce spiritous liquors into said Indian country, in violation of the terms of said act of Congress, and did have and keep spiritous and intoxicating liquors with their stock of goods at said James River, which said spiritous
8 liquors were not necessary for the officers of the United States nor of troops in service.

5th. That on the said 21st day of February, A. D. 1873, and for a long time prior thereto, the defendant John C. Bates was a captain in the military service of the United States, duly qualified and acting as such, and was in command of Fort Seward, a military post near the point where the said railroad crosses the said James River, and of all the military forces at or near said point.

6th. That on said 21st day of February, 1873, and for a long time prior thereto, the defendant J. A. Yeckley was, and still is, a lieutenant in the military service of the United States, duly qualified and acting as such, and was stationed at said Fort Seward.

7th. That on said 21st day of February the defendant Bates was in

formed that the plaintiffs had introduced spiritous liquors into said Indian country, in violation of said act of Congress, and that they had the same in their store near said Fort Seward; and thereupon the said defendant Bates, as such commanding officer, ordered the defendant Yeckley, with others, to search the said store, and in case they found spiritous liquors therein to seize the said stock of goods; and the said defendant Yeckley, with others, in pursuance of said orders, did search
9 said store and did find therein a large quantity of spiritous liquors, and did thereupon seize the said stock of goods, which were of the value of five thousand dollars and no more.

8th. That immediately after the seizure of said stock of goods the defendant Bates notified the United States district attorney for the Territory of Dakota and requested that proper legal proceedings be instituted for the condemnation thereof, and such proceedings were had; that afterwards, and before the commencement of this suit, all of said stock of goods was by the said defendant Bates delivered to the United States marshall for the Territory of Dakota, and was taken by said marshal, upon a proper writ issued for that purpose out of the district court of the United States for the Territory of Dakota; and said defendants are informed and believe that afterwards, and before the commencement of this action, all of said stock of goods were by said marshal delivered to the plaintiffs and by them received and accepted; and these defendants say that they never converted any goods, wares, or merchandise of the plaintiffs to their own use, and never took or seized any property of the plaintiffs, except as hereinbefore set forth, and the
10 stock of goods mentioned in the complaint, and the plaintiffs suffered no damage in the premises.

Wherefore these defendants demand that they be hence dismissed, with their reasonable costs.

O. P. STEARNS,
Attorney for Defendants Bates and Yeckley.

Second judicial district, county of Yankton.

TERRITORY OF DAKOTA,
District Court, ss:

W. WARD BILL AND W. N. BELMONT CLARKE, plaintiffs,
against
JOHN C. BATES AND J. A. YECKLEY, impleaded with others, defendants.

1st. The above-named defendants, for separate and amended answer to the complaint of the plaintiffs herein, deny each and every allegation therein contained not hereinafter admitted to be true.

2nd. These defendants admit that the plaintiffs were partners doing business as alleged in the complaint.

3rd. And these defendants, further answering, show to the court and allege that on the 21st day of February, 1873, the defendant
11 Bates was, and for a long time had been and still is, a captain in the military service of the United States, duly commissioned and acting as such, and in command of a military post of the United States at the point where the Northern Pacific Railroad crossed the James River, called Fort Seward, and of all the military forces in that vicinity.

4th. That on said 21st day of February, the defendant Yeckley was, and still is, a lieutenant in the military service of the United States, duly commissioned and acting as such, and was stationed at said Fort Seward, and subject to the orders of the defendant Bates.

5th. That a short time prior to said 21st day of February the defendant Bates, as such commanding officer, received orders from the then commanding officer of the Department of Dakota, to whose orders the defendant Bates was then subject, to enforce the provisions of the act of Congress entitled "An act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers, approved June 30th, 1834," in the territory between the Red River and the Missouri River, including the country at which the seizure hereinafter mentioned was made.

12 6th. That the defendant Bates had probable cause to believe, and did believe, that all said country was then and there Indian country, within the true intent and meaning of said act of Congress, and that the plaintiff had then lately introduced spiritous liquors into said country, and then had the same in the same store with the stock of goods mentioned in the complaint, and so believing the defendant Bates, as such commanding officer, ordered the defendant Yeckley, with others, to search said store, and in case they found spiritous liquors therein to seize the said stock of goods.

7th. That pursuant to said orders, and not otherwise, the defendant, Yeckley, with others, did, on said 21st day of February, search said store, and did find therein a large quantity of spiritous liquors, and did thereupon seize said stock of goods, which stock of goods was then and there of no greater value than five thousand dollars.

8th. That immediately after said seizure the defendant Bates notified United States district attorney for the Territory of Dakota thereof, and such proceedings were thereupon had that afterwards, and before the commencement of this suit, a warrant of attachment was duly issued out of the United States district court for the

13 third judicial district of the Territory of Dakota, under the hand of the clerk of said court and the seal thereof, upon a libel of information in behalf of the United States, and against said property, duly exhibited, presented, and filed in said court, and which warrant was duly directed to the marshal of the United States for said district of Dakota Territory, and was duly delivered to one A. H. Moore, then and there a deputy of said marshal, duly qualified and acting as such, to be executed, whereby, by the said warrant, the said U. S. marshal was commanded to attach the said property, together with the packages in which the same was contained, and to detain the same in his custody until the further order of the court respecting the same.

That by virtue of said writ, so issued, he, the said Moore, as such deputy, did attach and take into his possession all the said stock of goods, and that afterwards, and before the commencement of this suit, all of said goods and property were delivered to the plaintiffs, and by them received and accepted, and the plaintiffs suffered no damage in the premises.

9th. And thes' defendants further allege that the proceedings so commenced as aforesaid againt said stock of goods are still pending in the said court.

14 10th. And these defendants say that they never converted any goods, wares, or merchandise of the plaintiffs to their own use, and never took or seized any property of the plaintiffs, except as herein-before set forth.

Wherefore these defendants demand that they may be hence dismissed, with their reasonable costs.

O. P. STEARNS,
Attorney for Defendants Bates and Yeckley.

Second judicial district.

TERRITORY OF DAKOTA,
County of Yankton, ss:

CLARKE & BILL
vs.
JOHN C. BATES ET ALS.

W. Ward Bill and W. N. Belmont Clarke, as partners in business, under the firm-name and style of Clarke and Bill, plaintiffs, against John C. Bates and J. H. Yeckley, defendants.

We, the jury in the above action, find a verdict for the plaintiffs in the above-entitled action, and assess their damages at two thousand four hundred and sixteen and $\frac{66}{100}$ dollars.

L. COUGLETON, *Foreman.*

15 County of Pembina. Removed to Yankton County for trial.

DISTRICT COURT,
Territory of Dakota, ss:

W. N. BELMONT CLARKE AND W. WARD BILL, copartners in business under the firm-name and style of Clarke & Bill, plaintiffs,
against
JOHN C. BATES AND J. A. YECKLEY, impleaded with others, defendants.

At a general term of the district court of the Territory of Dakota, held in and for the county of Yankton, on the 23rd day of October, A. D. 1873—

Present, Hon. A. H. Barnes, judge—

This cause having been brought on for trial as against the above-named defendants Bates and Yeckley upon the issues of fact raised by the complainant and the amended answer of said defendants, and a jury having been duly impannelled and sworn, and the cause having been duly submitted to said jury, and the jury having returned a verdict in favor of the plaintiffs and against the said defendants Bates and Yeckley, and assessed their damages at two thousand four hundred and sixteen $\frac{66}{100}$ dollars:

16 Now, on motion of John B. and W. H. Sanborn, plaintiffs' attorney, it is adjudged that the above-named plaintiff, W. N. Belmont Clarke and W. Ward Bill, do recover of the defendants, John C. Bates and J. A. Yeckley, the sum of two thousand four hundred and sixteen and $\frac{66}{100}$ dollars damages, together with dollars costs, amounting in all to $

GEO. W. KINGSBURY, *Clerk.*

County of Pembina. Removed to Yankton County for trial.

DISTRICT COURT,
Territory of Dakota, ss:

W. N. BELMONT CLARKE AND W. WARD BILL, plaintiffs,
vs.
JOHN C. BATES AND J. A. YECKLEY, IMpleaded with others, defendants.

SIRS: Please to take notice that the above-named defendants appeal from the judgment rendered against them in the said action in said district court to the supreme of the Territory of Dakota.

O. P. STEARNS,
Defendants' Attorney.

To Mess's J. B. & W. H. SARBORN,
Plaintiffs' Attorney.
GEO. W. KINGSBURY,
Clerk of said district court.

17 County of Pembina. Removed to Yankton County for trial.

DISTRICT COURT,
Dakota Territory, ss:

W. N. BELMONT CLARKE AND W. WARD BILL, plaintiffs,
vs.
JOHN C. BATES AND J. A. YECKLEY, IMpleaded with others, defendants.

TERRITORY OF DAKOTA,
Yankton County, ss:

I certify that the foregoing is a true copy of the judgment-roll in the above-entitled action on file in my office, and of the whole of it, and of a notice of appeal therein, with admission of service on plaintiffs' attorney endorsed thereon.

Witness my hand, at Yankton, D. T., this 2nd day of January, A. D. 1874, and the seal of said court herewith attached.

[SEAL.] GEO. W. KINGSBURY,
Clerk.

18 County of Pembina. Removed to Yankton County for trial.

DISTRICT COURT,
Dakota Territory:

W. N. BELMONT CLARKE AND W. WARD BILL, plaintiffs,
against
JOHN C. BATES AND J. A. YECKLEY, DEFENDants.

The above-named defendants, having given notice of appeal to the supreme court of the Territory of Dakota from the judgment rendered against them in said action, and all parties being desirous of having the

same submitted to said supreme court at its January term, 1874, it is hereby stipulated by and between the parties hereto:

1st. That said cause be forthwith placed on the calendar of said supreme court for said January term, 1874.

2nd. That O. P. Stearns execute and file such bonds for costs as is required by the laws of Dakota on appeal to the supreme court, and the same shall be deemed sufficient without securities.

3rd. That said defendants, by their attorneys, shall as soon as pract'able make and propose a bill of exceptions in said actions, which shall
19 be submitted to Mess'rs J. B. & W. H. Sanborn, plaintiffs' attorneys, who shall as soon as pract'able propose any amendments to the same, and that such proposed bill of exceptions, with such proposed amendments, if any, shall then be submitted to the hon. judge who tried said cause for settlement, and thereupon said judge shall settle, sign, and seal a true bill of exceptionss, allowing or disallowing such proposed amendments, if any, as the truth and right of the matter shall require, and that such bill of exceptions so settled, signed, *signed* and sealed by said judge, shall be filed with the papers in said action in said supreme court, and shall be of the same validity, force, and effect as if made and filed with the clerk of said district court before such appeal, and by him returned to said supreme court with the other papers in said cause.

4th. That the said defendants have ninety days from this date to file such bond as is required by the laws of Dakota to stay proceedings on appeal, which bond shall, before being filed, be submitted to and approved by said plaintiffs' attorney, and on filing such bond proceedings in said case shall be stayed in said district court as if the same had been filed on taking said appeal.

20 5th. That said defendants' attorneys shall, as soon as pract'able, after the filing of such bill of exceptions, furnish the plaintiffs' attorneys printed copies of his points and authorities on said appeal, and the said cause shall be submitted to said supreme court on such printed points and authorities and on such printed arguments as the plaintiffs may submit within a reasonable time after service of defendants argument and without oral argument.

6th. And the parties hereto hereby waive all prerequisite notices and proceedings necessary to perfecting said appeal and settling said bill of exceptions, except as provided in this stipulation.

7th. That with said points and authorities the defendants' attorneys will furnish said plaintiffs' attorneys printed copies of the return of the clerk to the supreme court and of said bill of exceptions.

December 30th, 1873.

JOHN B. & W. H. SANBORN,
Plaintiffs' Attorneys.
O. P. STEARNS,
Defendants' Attorney.

It is stipulated and agreed that the annexed is a true bill of exceptions, and that the same be signed, sealed, and filed by the hon. judge who tried the case in the district court, January 19th, 1874.

O. P. STEARNS,
Defendants' Attorney.
JOHN B. SANBORN,
Plaintiffs' Attorney.

21 County of Pembina. Removed to Yankton County for trial.

DISTRICT COURT,
Territory of Dakota:

W. WARD BILL AND W. N. BELMONT CLARKE, plaintiffs,
against
JOHN C. BATES, J. A. YECKLEY, ALEXANDER Wishart, J. H. Burdick, and A. H. Moore, defendants.

This action came on for trial before the Hon. A. H. Barnes, judge of the said court, at a general term thereof, held in and for the county of Yankton, on the 22nd day of October A. D. 1873.

The plaintiffs interposed the following motion, to wit:

Second judicial district.

TERRITORY OF DAKOTA,
County of Yankton:

CLARKE & BILL
vs.
J. H. BURDICK ET AL.

And now, at the general term of this court, the said cause being called in its order for trial, the plaintiffs came by their attorney, John B. Sanborn, and the defendants also came by their attorney, O.
22 P. Stearns, and thereupon the plaintiffs, by their counsel, moved to strike out the third subdivision in defense of defendants Bates and Yeckley, in their answers set forth and pleaded, for the following reasons and upon the following grounds, viz:

1st. Because the same is sham and frivilous.

2nd. Because the country in which said trespasses were committed as set forth and alleged in said plaintiffs' complaint, and admitted in the answer, had long prior to the trespasses complained of been ceded to the United States by treaties long prior thereto proclaimed by the President of the United States, and binding and valid as public laws, of which this court must take judicial knowledge, and whereby all citizens had the right to carry on in said country trade and commerce unresisted by any special law or laws applicable only to fractions of the country in possession of the Indian tribes.

The defendant admitted that the goods in question were seized by the defendants Bates and Yeckley at a point west of the James River.

The court granted the motion, and the defendants Bates and Yeckley excepted.

23 The defendants Bates and Yeckley asked leave of the court to file an amended answer, which was granted, and an amended answer was filed.

On motion of the plaintiff, and by consent of parties, it was ordered that the trial proceed separately against the defendants Bates and Yeckley.

A jury was called and sworn.

The plaintiffs, to maintain the issues on their part, introduced evidence tending to prove the fact alleged in the complaint.

The defendants Bates and Yeckley, to maintain the issues on their

part, introduced evidence tending to prove the facts alleged in their amended answer.

The defendants Bates and Yeckley asked the court to charge the jury as follows:

If the jury find that the defendants seized the goods in question, having probable cause to believe and believing that they had been forfeited to the United States by the acts of the plaintiffs, and for the sole purpose of placing them in custody of a court having jurisdiction
24 to declare and enforce such forfeiture, and that the goods were taken from the defendants by a U. S. marshal upon a warrant issued by a court having such jurisdiction, commanding such marshal to seize such goods, the defendants cannot be held liable for any damages to such goods occurring after the goods were so taken from them.

The court refused so to charge, and the defendants Bates and Yeckley excepted.

The said defendants asked the court to charge the jury as follows:

If the jury find that the goods in question were rightfully taken from the defendants, after their seizure by a U. S. marshal upon a warrant of attachment issued by a court of competent jurisdiction, the defendants have a right to offset the value of the goods when so taken against the value of the same goods at the time of their seizure.

The court refused so to charge, and the defendants Bates and Yeckley excepted.

The defendants Bates and Yeckley asked the court to charge the jury as follows:

25 If the jury find that either of the defendants, in making the seizure of the goods in question, acted under and in pursuance of the immediate and imperative order of a superior military officer, and that such orders were executed by such inferior officer without malice, oppression, or fraud, or negligence, such defendant is not liable to plaintiffs for any damages resulting from such seizure.

The court refused so to charge, and the defendants Bates and Yeckley excepted.

The said defendants asked the court further to charge the jury as follows:

If the jury find that the seizure of the goods in question by the defendants was preliminary to a judicial proceeding in a court of competent jurisdiction, commenced against said goods for the purpose of having them adjudged forfeited to the United States for acts of the plaintiffs, and that such goods were, after their seizure by defendants, rightfully seized by a U. S. marshal upon a warrant issued by a court of competent jurisdiction in such proceedings, and that such proceedings are still pending and undetermined, the defendants cannot be held liable for damages resulting from such seizure.

26 The court refused so to charge, and the defendants Bates and Yeckley excepted.

The court then charged the jury as follows:

If you from the evidence find that the defendants took the goods from the plaintiffs, as charged in the complaint, then I charge you that the plaintiffs are entitled to a verdict in their favor.

To which the said defendants excepted.

The court then charged the jury further, as follows:

If you find that the plaintiffs are entitled to a verdict, then I charge you that the amount the plaintiffs are entitled to receive from the de-

fendants is the difference between the value of the goods at Jamestown, when taken, and the value of the goods at Fargo, when returned to them.

To which the said defendants excepted.

The jury then found a verdict for the plaintiffs for twenty-four hundred and sixteen ($2,416) dollars.

27 In the supreme court, January term, A. D. 1874.

UNITED STATES OF AMERICA,
Territory of Dakota, ss.

And now, on the 17th day of July, A. D. 1874, at an adjourned term of the supreme court of Dakota Territory—present the honorable P. C. Shannon, chief-justice, and the honorable' J. P. Kidder and A. H. Barnes, associate justices of said court—the following decision was rendered in said cause, to wit:

January term, A. D. 1874.

SUPREME COURT,
Dakota Territory:

W. N. BELMONT CLARKE ET ALS., RESPONDENTS,
vs.
JOHN C. BATES ET AL., APPELLANTS.

And now, on this 17th day of July, A. D. 1874, this action came up to be heard, and was submitted to the court on the printed briefs
28 of the respective attorneys of the parties, and, after duly considering the same, it is ordered and adjudged that the judgment of the court below be, and the same is, affirmed with costs, and this action is remitted to that court for further proceedings.

By the court.

To which decision of the court the said John C. Bates and James A. Yeckly, by their attorney, W'm Pound, esqr., then and there objected and excepted.

And afterwards, to wit, on the 7th day of August, A. D. 1874, the following opinion of the court was filed in this office:

Supreme court, January term, 1874.

W. N. BELMONT CLARKE ET AL., RESPONDENTS,
vs.
JOHN C. BATES ET AL., APPELLANTS.

KIDDER, J.—The plaintiffs brought an action of tresspass de bonis asportatis against the defendants for taking and carrying away a stock of merchandise of the plaintiffs from their store, which was sit-
29 uated near the Northern Pacific Railroad, on the west side of James River. The defendants admitted the taking, and justified upon the grounds that they were commissioned officers in the United States Army and on duty at Fort Seward; that liquors constituted a part of said stock taken by them, and had been introduced by the plaintiffs; and that the country where the store and the stock of the defendants were situated was "Indian country" within the meaning of the non-in-

tercourse act of 1834, and the amendments thereof, (4 U. S. Statutes, p. 729; 13 do., p. 29;) and pleaded other matter in mitigation of damages.

The plaintiffs moved to strike out the matter pleaded in justification, on the grounds that it was sham and frivolous, and constituted no defense to the plaintiffs' action, and the court below granted this motion; and the appellant assigns this ruling of the court as one and the chief error.

The country between the James and Missouri Rivers has from the earliest times been in the occupation and under the control of the Sioux or Dakota nation of Indians; the more northern portion, including the country where the plaintiffs' store was situated, having been occupied
30 by the Yanktonaise band, and the more southern by the Yankton band of that nation, until cessions to the United States were made by the respective bands.

On the 29th day of April, A. D. 1868, the United States concluded a treaty with the different bands of the Sioux, including the Yanktonaise band, and ratified and confirmed the same on the 16th day of February, A. D. 1869. (15 U. S. Statutes, p. 647.) By the second article of that treaty, p. 636, the Indians, parties thereto, "henceforth * * * * relinquish all claims or right in and to any portion of the United States or territories, except such as is embraced within the limits" in said article described, and except as thereinafter provided.

The portion of the territory embraced within the limits in said article specified was all between low-water mark on the east bank of the Missouri River and the one hundred and fourth west from Greenwich, and the north line of Nebraska and the forty-sixth parallel of north latitude. The exceptions in the cessions referred to in article two are found in article eleven and sixteen of said treaty.

The modification of the general cession of territory in article two made by article eleven is simply a reserved right by the Indians to
31 hunt on any lands north of the North Platte River, which includes the country between the one hundred and fourth meridien on the east and the summit of the Big Horn Mountains on the west, and the North Platte River on the south, and the country occupied by the Crows on the north, and also the right to hunt in Southern Nebraska and Northern Kansas on the Republican Fork of the Snaky Hill River. Article sixteen refers exclusively to the territory above-described, between the one hundred and fourth meredian and the summit of the Big Horn Mountain.

The military posts then established in the territory in the article named were the military posts of Fort Reno, Fort Phil Kearney, and Fort C. S. Smith. Indeed, it was the establishment of these posts and opening the road to them and by them to the settlement in Montana by the United States that the Sioux Nation complained of most loudly, and to which the attention of both contracting parties was most earnestly directed.

From an examination of the said treaty, it appears clear that all the lands occupied or claimed by any portion of the Sioux or Dakota Nation of Indians who were parties to the treaty, situated east of the Missouri River, were therein ceded to the United States.
32 This cession included the lands and territory on which the plaintiffs' store was situated from which the defendant took and carried away the said goods.

And this plase of the case presents the naked question, whether all that part of the United States "west of the Mississippi, and not with-

in the States of Missouri, Louisiana, or Arkansas," is, for the purpose of the non-intercourse act of 1834, and amendments, to be taken and deemed to be Indian country, notwithstanding it may, since the passage of the act, have been voluntarily ceeded by the Indians then occupying the same to the United States. The purpose and effect of the non-intercourse act of 1834 was to declare and proclaim what was then Indian country; country in which the manners, customs, and laws of the Indian tribes prevailed, and in which the United States should protect them in all their natural and guarante'd rights. It was not the purpose to declare or maintain that to be Indian country which was not in fact in the occupation and under the control of the Indians.

At no time in its history has the United States Government surrendered any portion of its territory over which it had once extended absolute jurisdiction and which had been occupied by its own citi-
33 zens. The policy of all branches of the Government, from the earliest times, has been to protect all citizen' in the occupation of ceeded Indian country, and to secure cessions as fast as demanded by the increase of our own population by fair and large compensation paid to the Indian; and when territory has once been solemnly ceded by the Indians to the United States, it has never afterwards, so far as we can learn, been considered or treated as Indian country for any purpose; on the other hand, these cessions by treaty, duly proclaimed by the President, have always been considered and treated by the people of the United States as an invitation from the executive department to all people to come, open, and possess the ceeded country.

In pursuance of a published treaty ceding the country to the United States, the plaintiffs, in common with large numbers of our people, came into the country between the James and Missouri Rivers and entered upon the ordinary avocations of our citizens.

After the ratification of the treaty of 1868, this country was no longer Indian country. The non-intercourse act of 1834, wherein it fixed and determined the limits of the Indian country at that time, was mod-
34 ified and changed by the treaty between the United States and the Dakota Nation of Indians made in 1868, as it had been by various other treaties proceedings this last; and the country in which the plaintiffs' goods were seized, as alleged in the complaint and admitted in the answer, was not, and had not been since the ratification of the treaty of 1868, Indian country.

The law as to the Indian country had been modified by a subsequent treaty. (The Cherokee Tobacco Case, 11 Wallace, p. 621; Foster and Elenn vs. Neilson, 2 Peters, p. 314.)

The defendants admit that the instructions given by the court below as to the question of damages is correct as a general rule, but claim that the rule was not applicable to and tended to mislead the jury in the case at bar. However good the intentions and purposes of the defendants may in fact have been, if we are right in our view of the law as above expressed, they committed against the plaintiffs a wilful and unlawful act, from which flowed all the damages they sustained.

The suing out of process, and the delivery of the goods to the officer having it, is part of the same transaction, and, in the eye of the
35 law, wilfully set on foot and consum'ated by the defendants against the plaintiffs. The defendants, in our view of the case, wrongfully and unlawfully seized and carried away the plaintiffs' goods and property. They falsely represented to a proper officer that they had properly taken them; that they were subject to seizure and con-

demnation, and did thereby induce such officer to take out process and take these same goods off their hands. The officer, as soon as he became correctly informed and advised of the fact, returned the goods to the plaintiffs. Upon this state of facts, we have no doubt that the plaintiffs are entitled to recover from the original trespassers the difference in the value of the goods when and where taken and the value of the goods when and where returned.

All the damages are unquestionably the result of the unlawful act of the defendants, and such as would reasonably be expected to follow such act, and ought not to be apportioned or qualified.

All the damages and injury were a part of the chain of effects resulting from these acts, and the defendants, if liable at all, are liable at least for the damages actually sustained by the plaintiffs from
36 these unlawful act' as naturally flowing therefrom.

We are satisfied that the rule as to what may be shown in mitigation of actual damages sustained in actions of trespass should be limited to evidence of actual benefit received by the plaintiffs after the trespass from the property taken. Under this rule, if after property has been taken in trespass from the owner an execution against him is levied thereon and the property sold, and a judgment against the owner thereby satisfied, this we think could and ought to be shown in mitigation of damages; so if the whole or a part of the property has been returned to the plaintiffs before trial, &c.; but this rule has been doubted, and able jurists have held that no application of the property without the owner's consent would be available in mitigation of damages. (Hamner vs. Wilsey, 17 Wend., p. 91.) But we think the law will presume the assent of the owner to such application of the property as is for his benefit to the extent of such benefit.

But where, as in this case, the verdict is only for the actual damages sustained, after deducting all benefits derived by the plaintiffs from the return of some portion of the goods, it was incompetent to show in mitigation of damages that after the trespass was committed, and
37 before the goods were returned, they were in the custody of the law, under and by virtue of process, for the purpose of enabling the jury to deduct from the aggregate damage the damage done the goods while in such custody. And if under the old practice a portion of the damage only could have been proved and recovered in an action vi et armis, and one other portion only in an action of trespass on the case, still under our code all may be shown and recovered under the complaint, stating the simple fact. All distinction in the old forms having been abolished, all may be recovered that flowed from the original trespass.

The original trespassers must respond to the extent of the damages. (Greenleaf on Evidence, vol. 2, Redfield's edition, 1868, p. 550, and notes and authorities there cited; Sedgwick on the Measure of Damages, 5th edition, pp. 615, 617, 618, note 1, and authorities.)

We find no error in the record.

The judgment below is affirmed.

38 UNITED STATES OF AMERICA,
Territory of Dakota, ss:

I, B. S. Williams, clerk of the supreme court of the Territory of Dakota, do hereby certify that the foregoing is a true, complete, and correct copy of all the records and other papers in the above-entitled cause on file in my office, and also of the decision and judgment of the said supreme court of Dakota Territory in said cause.

Witness my hand and the seal of said court, at Yankton, Territory of Dakota, this 28th day of July, A. D. 1875.

[SEAL.]

B. S. WILLIAMS,
Clerk Supreme Court, D. T.

(Indorsement on cover:) No. 93. John C. Bates and J. A. Yeckley plaintiffs in error, vs. W. N. Belmont Clark and W. Ward Bill. Dakota Territory, sup. court. Filed 6th August, 1875.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

JNO. C. BATES ET AL., PLAINTIFFS IN ERROR,
vs.
W. N. B. CLARK ET AL. } No. 93.

SUBMITTED UNDER RULE XX.

IN ERROR TO THE SUPREME COURT OF THE TERRITORY OF DAKOTA.

Brief for the Plaintiffs in Error.

In the Supreme Court of the United States.

OCTOBER TERM, 1877.

JNO. C. BATES ET AL., PLAINTIFFS IN ERROR,
vs.
W. N. B. CLARK ET AL.
} No. 93.

Submitted under Rule XX.

In error to the supreme court of the territory of Dakota.

BRIEF FOR THE PLAINTIFFS IN ERROR.

STATEMENT OF THE CASE.

Clark & Bill, the original plaintiffs, on the 21st day of February, 1873, were partners in the business of buying and selling merchandise on the west bank of the James River in the Territory of Dakota, near the point where the Northern Pacific Railroad crosses that stream. On that day their stock in trade was seized by the said Yeckley, then a lieutenant in the United States Army, acting under the orders of Bates, then a captain in the United States Army, commanding at Fort Seward, a military post near the intersection of said river and railroad. (Record 2, 3.)

July 11, 1873, Clark & Bill filed their complaint to recover for the injury by them sustained by this taking of their goods, which they alleged to be unlawful. (*Ib.*) In their answer Bates & Yeckley set up the defense that "all the country at and near the point where the Northern Pacific Railroad crosses the James River, in the said Territory of Dakota, was on the 21st day of February, 1873," * * "Indian country, within the true intent and meaning of the act of Congress" approved June 30, 1834, c. 161, § 20, (4 Stats. 732,) as amended by the act of March 15, 1864, c. 33, found in 13 Stats., 29; that on the 21st of February, and immediately prior thereto, Clark & Bill introduced spirituous liquors into said Indian country in violation of said act of Congress, and had and kept such liquors with their stock of goods at James River; that Bates, as commander of the military post, being informed that Clark & Bill had so introduced intoxicating liquors into that country, and had the same in their store, ordered Yeckley and others to search the store, "and in case they found spirituous liquors therein to seize the said stock of goods;" and the said Yeckley with others, in pursuance of said orders, did search said store, and did find therein a large quantity of spirituous liquors, and did thereupon seize said stock of goods. Immediately after their seizure, Captain Bates notified the United States district attorney for the Territory, who instituted proceedings for the condemnation of the goods, which were delivered by Captain Bates to the United States marshal for the Territory upon proper process, issued in the course of such proceedings. It was further alleged that Captain Bates had been ordered by the United States Army officer commanding the Department of Dakota to enforce the

provisions of the aforesaid act of Congress "in the territory between the Red River and the Missouri River," including the country in which this seizure was made; that Captain Bates believed and had probable cause to believe this place to be Indian country under that act; and that the proceedings for condemnation were pending at the time of filing the answer. (Record, 4, 5.)

This suit was commenced in the district court of Yankton County, where there was a trial by jury and a verdict rendered of $2,416.66 for the original plaintiffs, the court having first ordered that so much of the original defendant's answer as set up that the place of seizure was Indian country to be struck out. To this the said defendants excepted. The respective parties introduced evidence tending to prove the facts alleged in the complaint and answer, and the defendants, Bates and Yeckley, then requested the court to instruct the jury as follows:

"If the jury find that the defendants seized the goods in question, having probable cause to believe and believing that they had been forfeited to the United States by the acts of the plaintiffs, and for the sole purpose of placing them in custody of a court having jurisdiction to declare and enforce such forfeiture, and that the goods were taken from the defendants by a United States marshal upon a warrant issued by a court having such jurisdiction, commanding such marshal to seize such goods, the defendants cannot be held liable for any damages to such goods occurring after the goods were so taken from them."

The court refused so to charge, and the defendants, Bates and Yeckley, excepted.

The said defendants asked the court to charge the jury as follows:

"If the jury find that the goods in question were rightfully taken from the defendants, after their seizure by a United States marshal upon a warrant of attachment issued by a court of competent jurisdiction, the defendants have a right to offset the value of the goods when so taken against the value of the same goods at the time of their seizure."

The court refused so to charge, and the defendants, Bates and Yeckley, excepted.

The defendants, Bates and Yeckley, asked the court to charge the jury as follows:

"If the jury find that either of the defendants, in making the seizure of the goods in question, acted under and in pursuance of the immediate and imperative order of a superior military officer, and that such orders were executed by such inferior officer without malice, oppression, or fraud, or negligence, such defendant is not liable to plaintiffs for any damages resulting from such seizure."

The court refused so to charge, and the defendants, Bates and Yeckley, excepted.

The said defendants asked the court further to charge the jury as follows:

"If the jury find that the seizure of the goods in question by the defendants was preliminary to a judicial proceeding in a court of competent jurisdiction commenced against said goods for the purpose of having them adjudged forfeited to the United States for acts of the plaintiffs, and that such goods were, after their seizure by defendants, rightfully seized by a United States marshal upon a warrant issued by a court of competent jurisdiction in such proceedings, and that such proceedings are still pending and undetermined, the defendants

cannot be held liable for damages resulting from such seizure."

The court refused,so to charge, and the defendants, Bates and Yeckley, excepted.

The court then charged the jury as follows:

"If you from the evidence find that the defendants took the goods from the plaintiffs, as charged in the complaint, then I charge you that the plaintiffs are entitled to a verdict in their favor."

To which the said defendants excepted.

The court then charged the jury further, as follows:

"If you find that the plaintiffs are entitled to a verdict, then I charge you that the amount the plaintiffs are entitled to receive from the defendants is the difference beween the value of the goods at Jamestown when taken and the value of the goods at Fargo when returned to them."

To which the said defendants excepted.

The jury then found a verdict for the plaintiffs for twenty-four hundred and sixteen ($2,416) dollars. (Record, 10, 11.)

Judgment was rendered on this verdict, (Record, 6, bottom,) from which an appeal was taken to the supreme court of the Territory, where that judgment was affirmed, (Record, 11, folio 28,) and the appellants excepted. Their exceptions being overruled and judgment entered against them, they brought the cause here.

ASSIGNMENT OF ERRORS.

The plaintiffs in error assign as error the action of the supreme court of the Territory of Dakota, whereby "it is ordered and decreed that the judgment of the court below be, and the same is, affirmed with costs."

BRIEF.

The main question which appears to have attracted the attention of the territorial supreme court was, whether or not the *locus in quo* was "Indian country." (See opinion, Record, 11–14.) We will, therefore, first consider it, though we deem that court in error in the course taken upon some other legal propositions stated in the case.

I.

The first section of the act of 1834, c. 161, thus defines what shall be deemed "Indian country:" "That all that part of the United States west of the Mississippi, and not within the States of Missouri and Louisiana, or the Territory of Arkansas, and also that part of the United States east of the Mississippi River, and not within any State to which the Indian title has not been extinguished, for the purposes of this act be taken and deemed Indian country." (4 Stats., 729.)

The 20th section of this act prohibits the sale of spirituous liquors to an Indian, their introduction into the Indian country, or any attempt to introduce them there, under penalty of the forfeiture of the offender's whole stock of goods among which such liquors are found. (*Id.*, 432.)

This section was thus amended by the act of March 15, 1864, c. 33:

"*Be it enacted, &c.*, That the twentieth section of the 'act to regulate trade and intercourse with the Indian tribes, and to preserve peace on the frontiers,' approved June thirtieth, eighteen hundred and thirty-four, be, and the same is hereby, amended so as to read as follows, to wit:

"'SEC. 20. *And be it further enacted*, That if any person shall sell, exchange, give, barter, or dispose of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or Indian agent appointed by the United States, or shall introduce or attempt to introduce any spirituous liquor or wine into the Indian country, such person, on conviction thereof, before the proper district or circuit court of the United States, shall be imprisoned for a period not exceeding two years, and shall be fined not more than three hundred dollars: *Provided, however*, That it shall be a sufficient defense to any charge of introducing or attempting to introduce liquor into the Indian country if it be proved to be done by order of the War Department, or any officer duly authorized thereunto by the War Department. And if any superintendent of Indian affairs, Indian agent, or subagent, or commanding officer of a military post has reason to suspect or is informed that any white person or Indian is about to introduce or has introduced any spirituous liquor or wine into the Indian country in violation of the provisions of this section, it shall be lawful for such superintendent, agent, subagent, or commanding officer to cause the boats, stores, packages, wagons, sleds, and places of deposit of such person to be searched; and if any such liquor is found therein, the same, together with the boats, teams, wagons, and sleds used in conveying the same, and also the goods, packages, and peltries of such person, shall be seized and delivered to the proper officer, and shall be proceeded against by libel in the proper court, and forfeited one-half to the informer and the other half to the use of the United States; and if such person be a trader, his license shall be revoked and his bond put in

suit. And it shall moreover be the duty for any person in the service of the United States, or for any Indian, to take and destroy any ardent spirits or wine found in the Indian country, except such as may be introduced therein by the War Department. And in all cases arising under this act Indians shall be competent witnesses.'' (13 Stats., 29.)

TREATY.

The relation of the Indians to the Government is peculiar and *sui generis*. The right to extinguish the Indian title to the lands belongs to the sovereign, and the individual citizen can obtain no title to them recognizable in our courts, except with the assent of the Government. (Johnson *v.* McIntosh, 8 Wheaton, 543, 603; Cherokees *v.* Georgia, 5 Peters, 1, 17, &c.; Worcester *v.* Georgia, 6 Peters, 515, 581, &c.; 3 Kent's Com., *377, *et seq.*; Lee *v.* Glover, 8 Cowen, 189; Harmon *v.* Partier, 12 Sm. & Mar., 425; Act of Mar. 30, 1802, § 12.)

The Indian title can only be extinguished, then, by negotiation with the tribe or nation; *i. e.*, by treaty. A State cannot enter into a treaty. Hence the power to receive cession of Indian lands, wherever situate, is exclusively in the Federal Government. (6 Peters, 581, *et se.q*)

So long as the Federal Government recognizes the tribal existence and condition of an Indian community, so long it constitutes a "domestic, dependant nation"—'dependant' as to the United States, though within the territorial limits of a State—*imperium in imperio*. (5 Peters, 17; Kansas Indians, 5 Wallace, 756–'75.)

The members of the tribe are not citizens of the State in which they dwell. (Goodell *v.* Jackson, 20 Johns., 694, 710, *et seq.*)

The foregoing remarks and citations have been made to emphasize the fact that, as tribes and territorially, the Indians and their lands have an existence and *status* distinctly marked, and widely separated and different from those of the people and territory by which they are surrounded.

Those decisions which hold that they are, nevertheless, subject to the *criminal* jurisdiction of the State courts, over *offenses not connected with commerce*, will not be here discussed, because it is not perceived that they affect the present question. They do not apply to a violation of United States statute; to an act prohibited only by Federal legislation, enacted under the constitutional power to regulate commerce with the Indian tribes.

It is upon this provision of the constitution, and upon the statutes passed in pursuance of it, that the claim for condemnation of the goods mentioned in this case was based.

Under the old Articles of Confederation of 1777, Art. IX, it was provided that "the United States in Congress assembled shall also have the exclusive right and power of * * * regulating the trade and managing all affairs with the Indians, *not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.*" (1 Ellott's Debates, 82.) Comparing that with the phraseology of the present Constitution, Art. I, section 8, Madison says, in the Federalist, (No. 41:) "The regulation of commerce with the Indian tribes is very properly unfettered from two limitations in the Articles of Confederation, which render the provision obscure and contradictory. The power is there restrained to Indians not members of any of the States, and is not to violate or infringe the legislative right of

any State within its own limits. What description of Indians are to be deemed members of a State is not yet settled, and has been a question of frequent perplexity and contention in the Federal councils. And how the trade with Indians, though not members of a State, yet residing within its legislative jurisdiction, can be regulated by an external authority without so far intruding on the rights of internal legislation is absolutely incomprehensible. This is not the only case in which the Articles of Confederation have inconsiderately endeavored to accomplish impossibilities; to reconcile a partial sovereignty in the Union with complete sovereignty; to subvert a mathematical axiom, by taking away a part and letting the whole remain.

"As it now stands it is applicable to all the Indian *tribes*, and it is immaterial whether they continue within the boundaries of a State, or inhabit a part of one of the Territories, or roam at large through regions over which the United States have no jurisdiction; the trade with them is, in all its forms, subject exclusively to the regulations of Congress." (Duer's Const. Jur., 281; Rawle on the Const., ch. 9, 84; 2 Story on Const., §§ 1097–1101.)

The first legislation under this clause was by the temporary act of July 22, 1790, c. 30, (1 Stats., 135,) continued in force, somewhat changed, by acts of March 1, 1793, c. 19, (1 Stats., 329,) of May 19, 1796, c. 30, (1 Stats., 469,) and of March 3, 1799, c. 46, (1 Stats., 743.) The system of regulation thus created was rendered permanent by act of March 30, 1802, c. 13, (2 Stats., 139.) The next general act upon this subject was that of June 30, 1834, c. 161, (4 Stats., 729.) Its twentieth section, as amended by the act of February 13, 1862, c. 24, (12 Stats., 339,) (indentical with that of March 15, 1864, c. 33, 13 Stats.,

29, hereinbefore recited *in extenso*, except that the latter gives the circuit court jurisdiction, as well as the district court, and makes one other immaterial verbal change, substituting "the duty of" instead of "lawful for,") was the law in force when the goods of Clark & Bill were seized. The Government contends that its provisions extended to this country, or, at any rate, to the adjoining Indian reservations.

What is now the Territory of Dakota is embraced within the definition of "Indian country," established by the first section of the act of June 30, 1834. It has not since been taken out of that category (as to lands to which the Indian title has not been extinguished at any rate) by any subsequent express legislation.

The language used by Congress and the courts shows that even if the Territory and its citizens had been erected into a State this would not, *ipso facto*, cause it to cease to be "Indian country." Thus, in the act of June 14, 1858, c. 163, § 3, (11 Stats., 363,) relating to the execution of "process in the Indian country," the marshal is authorized to employ a *posse comitatis*, not exceeding three persons in *any of the States* respectively," &c.

In the cited case of United States *v.* Bailey, (1 McLean, 235,) the learned judge said there could be no doubt of the intention of Congress to punish all offenses, "and especially the crime of murder, committed in the Indian country, *though within the limits of a State.*" (See, also, United States *v.* Cisna, *id.*, 254.)

In United States *v.* Ward, (1 Woolw. C. C., 19,) Miller, J., said: "The circumstances, much enlarged upon at the bar, that the reservation is but a small tract of country; that emigration has filled up the adjoining lands; that the State has included the *locus in quo* within

an organized county, and by its courts of justice, and its people, by their customs and intercourse, have assumed new and close relations to this tribe of Indians, afford no assistance in determining the question before us."

Upon page 21 he says: "The act of June 30, 1834, provides that the section of country in which this reservation is situated shall be Indian country," &c. "This provision brings the reservation within our jurisdiction. If it remained unchanged or unqualified, it would conclude the question. It is insisted that the act * * * admitting the State into the Union withdraws the locality from the force and effect of the act." An examination of the act for the admission of Kansas then leads the court to conclude that it had no jurisdiction to punish the murder of one white by another committed within an Indian reservation in that State. But this does not affect the question now before the court, except that it shows that the mere admission of a State did not cause all the territory included within its limits to cease to be Indian country. *A fortiori*, then, the whole of a country retaining its territorial organization may continue to be so considered. The right to regulate trade with the Indians, wherever found, irrespective of State limits, rests upon constitutional sanction, while there is none such granting *criminal* jurisdiction over Indian reservations. This act of 1834, as amended, is "a regulation of commerce." "Commerce with the Indian tribes means commerce with the individuals composing those tribes. The act before us describes this precise kind of traffic or commerce, and therefore comes within the terms of the constitutional provision." (United States *v.* Holliday, 3 Wallace, 417, per Miller, J.) The opinion then

proceeds to show that the jurisdictional limits of the States do not affect this provision. Then it says:

"It follows from these propositions, which seem to be incontrovertible, that if commerce, or traffic, or intercourse is carried on with an Indian tribe, or with a member of such tribe, it is subject to be regulated by Congress, although within the limits of a State. The locality of the traffic can have nothing to do with the power. The right to exercise it in reference to any Indian tribe, or any person who is a member of such tribe, is absolute, without reference to the locality of the traffic, or the locality of the tribe, or of the member of the tribe with whom it is carried on."

Having this general power over the subject of commerce or intercourse with the Indian tribes and their members, Congress could rightfully define the "Indian country" within which the unlicensed introduction and sale of liquors were prohibited, and embrace States and Territories, at pleasure, within the terms of the definition.

The act of 1834, as amended, was within its constitutional powers. It could withdraw from the operation of this statute so much or so little of this territory as it thought would best subserve the interests of this intercourse and commerce; or could (from like considerations) enlarge its boundaries. It is for the United States to recognize and declare the tribal condition of Indian bands, and the courts will follow the executive in this particular. (5 Peters, 1; 6 Peters, 515.) It may properly regulate the commerce with them by inhibiting the introduction of spirituous liquors into lands adjacent to their reservations.

"From the very moment the General Government

came into existence, to this time, it has exercised its power over this unfortunate race in the spirit of humanity and justice, and has endeavored by every means in its power to enlighten their minds and increase their comforts, and *to save them, if possible, from the consequences of their own vices.*" (United States *vs.* Rogers, 4 Howard, 572.)

"The policy of this act is the protection of those Indians who are, by treaty or otherwise, under the pupilage of the Government from the debasing influence of the use of spirits; and it is not easy to perceive why that policy should not require their preservation from this, to them, destructive poison when they are *outside of a reservation* as well as within it. The evil effects are the same in both cases." (United States *vs.* Holliday, 3 Wall., 415, 416; United States *vs.* 43 Gallons of Whisky, 93 U. S., 195.) Accordingly this statute was passed as *a commercial regulation*, (*Id.*, 417,) and power given to punish that as an offense which otherwise would have been none. That is, Congress passed the law by virtue of its control over *the subject-matter*, and not by force of its territorial jurisdiction, though here it possessed both. (United States *vs.* Bailey, 1 McLean, 234; United States *vs.* Cisna, *Ib.*, 254.) Though it is indisputable (as Judge Kidder remarks) that a treaty may supersede a statute, yet his deduction that the treaty of cession made with the Sioux April 29, 1868, did limit the act of June 30, 1834, is incorrect. It did not purport to affect a statute based upon the constitutional authority to regulate commerce regardless of the political situation of the land over which such regulation extended. The elaborate reports of the committees which accompanied the introduction into Congress of this statute show that its gen-

eral language, embracing so large a tract, was advisedly used, and that its purpose was to supersede and neutralize or overrule the decision of this court in American Fur Co. *vs.* United States, (2 Peters, 358,) that by the cession of land it ceased to be Indian country. The precedent legislation upon which that case was decided expressly provided for a variation by treaty of the boundary-line of the Indian country, while in the act of June 30, 1834, it is inflexible, though of course liable to be changed by subsequent law or treaty; but the changed phraseology is so significant as to show that it is not to be disturbed by any inference derivable argumentatively from the changed *statutes* of the land by operation of a treaty. Compare acts of March 30, 1802, c. 1381, *proviso*, (2 Stats., 141,) and the first section of the act of June 30, 1834, c. 161, hereinbefore printed in full, (*ante*, page —). The treaty of April 29, 1868, not having the effect to change the boundaries of the Indian country, the action of the court, excepted to by the plaintiffs in error, in striking out the third specification of their original answer (Record 3, folio 7) was erroneous. (Record 9, folio 22, bottom.)

II.

The plaintiffs in error introduced evidence tending to prove the facts set out in their amended answer. (Record, 9, bottom, and 10, top.) That answer is found on pages 4 and 5 of the record, stating the official positions of the original defendants; that they each acted in the premises under the express orders of their military superiors, believing the *locus in quo* to be part of the Indian country, and on information that the original plaintiffs had introduced spirituous liquors therein, in violation of

the act of June 30, 1834, c. 161, § 20; which liquors, upon search made under that section, were found, seized, and turned over to the civil authorities, as required by law, who instituted proceedings, which are still pending.

If the assumption of the court, that this place ceased to be Indian country upon the promulgation of the treaty of April 29, 1868, was ill-founded, of course the result justified the search and seizure, and the first request for instruction (Record, 10, near top; *ante*, p.) should have been granted.

The evidence tended to prove the sixth specification of the amended answer, (Record, 5, folio 12, top;) that Captain Bates honestly believed that this *locus* was Indian country, and acted upon that belief. Whether it was Indian country or not depended upon a construction of the statute and treaty, after proof of the fact of the place and circumstances of seizure. Acting in good faith, and in obedience to military orders, he had a right to seize the liquors, in order to have this legal question determined by the courts. If the court ruled this not to be Indian country, that no more made the military commander liable than a sheriff is if he holds goods attached, *pendente lite*, and the defendant ultimately prevails in the suit. In the hands of Captain Bates and his subordinates these goods were as much *in custodia legis* as when in the hands of the marshal; and the military official was no more liable than the civil for the legal seizure of the liquors, whether they were ultimately forfeited or released. (United States *v.* 508 Barrels of Spirits, 5 Blatch., 407.)

The other requests as to the taking of the goods upon civil process should have been granted. (Record, 10.)

Also the request to charge the jury that the original

defendants were justified if they acted "under the immediate and imperative order of a superior military officer," &c. (Record, 10, folio 25.)

The liquors were liable to seizure, not merely *in* the Indian country, but if, though outside of it, they were "about to be introduced" into it. (Act of June 30, 1834, c. 160, § 20; United States *v.* 43 Gallons of Whisky, 93 United States, 195.) It was for the military commander to say whether or not facts existed which justified apprehension that they would be so used, and required their seizure, that legal proceedings might be had. Being an act within his jurisdiction, his subordinates were bound to obedience of his orders in executing it. Captain Bates and Lieutenant Yeckley acted *colore officii;* and as no process was necessary previous to the seizure, the order of their superior was their justification within the principles established by Erskine *v.* Hohnbach, (14 Wall., 613,) and kindred cases.

EDWIN B. SMITH,
Assistant Attorney-General.

No. 93—2

Supreme Court of the United States.

OCTOBER TERM, A. D. 1877.

JOHN C. BATES et al.,
Plaintiffs in Error,

vs.

W. N. BELMONTI CLARKE et al.,
Def'ts in Error.

BRIEF OF DEF'TS IN ERROR.

JOHN B. SANBORN,
Counsel for Def'ts in Error.

Pioneer Press.

IN THE SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1877.

JOHN C. BATES *et al.*,
Plaintiffs in error,
against
W. N. BELMONTI CLARKE *et al.*,
Defendants in error.

BRIEF OF DEFENDANTS IN ERROR.

Indian country is defined and limited by the laws of the land. Treaties made and confirmed under the provisions of the constitution are as much the law of the land as acts of Congress. And where the provisions of a treaty and an act of Congress are in conflict, that which was the last act of the government must prevail. Treaties may supercede prior acts of Congress, and acts of Congress may supercede prior treaties.

The Cherokee Tobacco Case, 11th Wallace, 621.
Foster & Elam vs. Nielson, 2 Peters, 314.
8th Curtice, 121.

2. In an action of trespass *de-bonis-asportatis*, no rule of damage known to the law is more favorable to the trespasser, than that he shall be held responsible for the difference in the value of the goods when and where taken, and the value of the same when and where returned, in all cases where after the trespass the property in whole or part, is returned to the owner, or appropriated for his benefit.

Greenleaf on Evidence, vol. 2; Redfield's edition, 1868, p. 550, and notes and authorities there cited.
Sedgwick on Damages, 5th edition, p. 615, note 1 and authorities.
Hammond vs. Wilsley, 17 Wend., p. 91.
Otis vs. Jones, 21 Wend., p. 394.
Tiffany vs. Lord, 65 N. Y., p. 310.
Farrer vs. Barron, 5 Mass., p. 395.
Prescott vs. Wright, 6 Mass., p. 20.
Stewart vs. Martin, 16 Ve., p. 397.

Is section 1 of the Non-Intercourse Act of 1834, 4th U. S. Statutes, 729, to be construed as fixing and determining what country or territory shall, for the purposes of that act, be Indian country, so that neither the course of events, subsequent treaties between the United States and the Indian tribes occupying the same, nor any thing other than a subsequent act of Congress can change its condition, so that it will not longer be "Indian country" for the purposes of that act?

I. The act declared that to be Indian country, which was in fact unceded Indian country at the date of its passage. This is general history known to the courts as to all other men. At that time the country from the Red river

of the North to the Missouri river, and from the British Possessions to the State of Missouri, with the exceptions of a few small reservations for other Indians, was occupied by the Dakota or Sioux Nation of Indians. By the treaty of April 29th, 1868, (15th Statutes, 636,) this nation ceded all these lands to the United States for ample consideration. (Article II of said treaty, p. 636.) This cession is absolute and without any reservations. Articles eleven and sixteen of said treaty, so far as they relate to country north of the North Platte, must be construed together and with reference to other parts of the treaty. So construed, the country in these articles referred to, is the country east of the summit of the Big Horn, and west of the 104th degree of longitude west from Greenwich. This was the country through which the military road passed that had to be closed, and in which the "military posts" were that had to be abandoned. (See Article sixteen of said treaty.)

Section one of the act of 1834, is in the following words, viz.: "That all that part of the United States west of the Mississippi and not within the States of Missouri and Louisiana or territory of Arkansas; and, also, that part of the United States east of the Mississippi river, and not within any State to which the Indian title has not been extinguished, for the purposes of this act, be taken and deemed to be the Indian country."

Between the date of the passage of that act in 1834 and the trespass, to recover damages for which this action is brought, many treaties were made by the Indians then inhabiting the same, in nearly all of which cessions of land were made to the United States; and in the treaty of April

the Indian country of 1834. The knowledge of all men as to the present condition of the country embraced in the Indian country of 1834 is cited in support of this position.

III. The act of 1834, wherein it defines and limits the "Indian Country," has been superceded and modified by all the treaties since made between the United States and Indian tribes occupying the same, by which portions of such country have been ceded to the United States. Country ceded by the Indians to the United States is no longer Indian country. Treaties may supercede prior acts of Congress.

Authorities above cited:

IV. The construction claimed by the appellants leads to the greatest absurdity. If in 1835 all the Indians in the Indian country as described in the act of 1834 had made a treaty ceding all that country, and had thereupon removed from the United States, the country would still have been Indian country and the non-intercourse law in full force. This could not have been for the reasons—1st. That the treaty would have superceded the law, and the country have become a part of the public domain, free and clear from all Indian title. 2. The reason of the law having ceased, the law itself ceased, and the general laws of the United States governing trade and intercourse between citizens would have become applicable to that country as to all other portions of the country.

V. Congress, by the act of 1834, had no purpose to and and did not make that Indian country which before the passage of said act was not so. Congress simply proclaimed the existing state of facts as to what the Indian country then included. For the time being and until portions of

this country were ceded by treaty, voluntarily abandoned or taken from the Indians by conquest, this statute was binding on the Courts, but no longer. The Courts are just as much bound by subsequent events and treaties, so far as boundary lines are changed thereby, as they would be by subsequent acts of Congress. The question of what is Indian country and what is to be treated as Indian country is a question to be determined by the Courts with reference to the laws, treaties and facts pertaining thereto. Congress has not the power to declare that to be Indian country which is not Indian country, and by such means exclude the citizens of the United States from the possession and occupation thereof, or from carrying on lawful trade and commerce therein under the general laws.

VI. The positions and authorities taken and cited by the appellants upon the rule of damages are in no respect applicable to the case at bar. In this case an officer of the United States Government, authorized to seize the goods and property of citizens under certain circumstances without process, and hold them until he notifies a United States marshal, and until the marshal appears with process to take and hold the goods (13 U. S. Statutes at Large, p. 29,) under the misapprehension that the circumstances authorized such seizure, in this case unlawfully seized and took the goods and property mentioned in the complaint from the plaintiffs, and notified the marshal, who thereupon procured process and took possession of the same goods, and thereafter, finding the seizure by the defendants and himsef unlawful, turned all this property back to the respondents. In such a case the rule must be that the plaintiff is entitled to recover the difference between the value of the goods when

and where taken and the goods when and where returned, against any defendant against whom an action of trespass can be maintained. And this principle is sustained by the authorities cited by respondent.

In the case of a levy of an attachment or execution without the connivance or aid of the original trespasser, for valid cause to satisfy debt, the law simply does that which the debtor should have done—applies the debtor's property to the payment of his debt; and when the law takes possession of it and applies it to this purpose, it may be the same as if the owner had taken full possession, and any damage done or happening thereafter may be the same as if it had been done by the owner, or happened when in his possession. But in this case the original trespasser induced the seizure for the purpose of having the goods libelled and forfeited when there was no debt and no liability to forfeiture, otherwise the goods could not have been returned. The reason why courts will not allow a party to have his debts paid with his goods and then recover the full value of the same in an action of trespass because there was a tortious taking before a legal levy, is plain; but the reason why courts should not allow a party whose goods and property have been unlawfully taken from him by the defendant and retained for a time and then returned to him, to recover the damages he has sustained by such unlawful taking and detention, is difficult to see. And it can make no difference in such a case that such goods were a portion of the time in the custody of the law at the instigation of the original trespasser. To protect the original trespasser at all, the result must show that the goods were taken into legal custody without his conni-

vance for valid cause, and that the owner, his creditors or the country has derived some benefit from such legal proceedings. The risks of all miscarriages are with the original trepasser in any event. The right of action by the respondents against the appellants for the entire value of the goods was complete the moment the goods were unlawfully taken, and their liabiliIy in damages cannot be mitigated or changed by what the law afterwards attempted to do, and failed to do. The return of the goods, the disposition of the same for the benefit of the owner by virtue of legal proceeding, or the confiscation and appropriation of the same by the law, might be shown in mitigation of damage. But the burden of proof was on the defendants, to show a disposition made either with the actual consent of the respondents, or by such legal seizure and sale under process as would in law necessarily imply consent. But no sale under process was claimed. The seizure was temporary and made at the instigation of appellants, and damage to the goods under such seizure cannot be shown in mitigation of damages. There was no error in the courts below.

JOHN B. SANBORN,
Counsel for Defendants in Error.

Transcripts
of
Records.
1876

266

Supreme Court of U.S.
3rd Otto
619 - End.

Burke